No. 88-1274

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

ROLF LARSEN,

Petitioner,

vs.

PHILADELPHIA NEWSPAPERS, INC., KNIGHT-RIDDER NEWSPAPERS, INC., PG PUBLISHING CO., WILLIAM BLOCK, PAUL BLOCK, JR., DANIEL R. BIDDLE, EDWIN GUTHMAN, SAM S. McKEEL, FRITZ HUYSMAN, EILEEN FOLEY, JOHN G. CRAIG, JR., and ROBERT SURRICK,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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I. Counterstatement of the Case

On November 14, 1983, petitioner Rolf Larsen, a member of the Supreme Court of Pennsylvania, initiated this action against two Pennsylvania newspapers, various officers and employees of those newspapers, and a member of the Pennsylvania Judicial Inquiry and Review Board ("JIRB"). In material part, he sought injunctive relief and monetary damages from the defendants for allegedly disseminating and publishing excerpts of proceedings before the JIRB, which had conducted an investigation of Justice Larsen for alleged improprieties.

As ultimately amended, Justice Larsen's Complaint included two counts relevant to his present petition, Count IV and Count VI, each alleging an invasion of a right to privacy supposedly afforded him by common law and by certain portions of Pennsylvania's Constitution, statutes, and rules specifying that some stages of JIRB proceedings should be confidential. *See* 105a-111a.*

Respondents ultimately demurred to portions of the Amended Complaint, including Counts IV and VI. On May 16, 1984, the Court of Common Pleas of Allegheny County issued an order that, *inter alia*, sustained respondents' demurrer to Counts IV and VI, but granted leave to amend Count IV. *See* 73a. Shortly thereafter it certified this portion of its Order for interlocutory appeal pursuant to 42 Pa. C.S. §702(b) and Pa.R.App.P. 312. 75a. Those portions of the action not covered by this certification remain pending in the Court of Common Pleas.

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* Page references are to the Appendices to Justice Larsen's Petition for Writ of Certiorari.

On June 2, 1988, the Pennsylvania Superior Court issued its Order and Opinion in this interlocutory appeal and affirmed the lower court's holding regarding Count IV and VI. Relying in part upon this Court's decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) and in part upon its own reading of the relevant provisions of state law, the court concluded that neither Pennsylvania's Constitution, its statutes, nor its rules created the causes of action pressed by Justice Larsen in those counts. Like the lower court, however, it granted Justice Larsen permission to amend his claim for invasion of privacy (Count IV) to reflect more clearly the basis for his allegation that the information published about him had been obtained "illegally." *See* 8a-20a.

On October 31, 1988, the Supreme Court of Pennsylvania denied cross-petitions for allowance of appeal. 1a-2a.

II. REASONS WHY CERTIORARI SHOULD BE DENIED

This Court should deny certiorari for any one of three reasons: (1) the decision below is not a final judgment and therefore is beyond this Court's jurisdiction; (2) the decision below was supported by adequate and independent state grounds, and (3) the decision below was based upon Justice Larsen's failure to plead his case with sufficient particularity.

A. The decision below is not a final judgment.

Justice Larsen would invoke the jurisdiction of this Court under 28 U.S.C. §1257(c), which allows review only of "[f]inal judgments or decrees . . . ." Here, the judgment is far from final.

The trial court sustained respondents' demurrer to some, but not all, of the counts in the Amended Complaint. As to one of the two counts cited in Justice Larsen's present petition, Count IV, he was granted leave to amend. Prior to any such amendment, the Pennsylvania Superior Court accepted an interlocutory appeal under a provision authorizing immediate review where such review might materially advance the ultimate termination of the litigation. *See* 42 Pa. C.S. §702(b); Pa.R.App.P. 312. Eventually, the Superior Court affirmed the trial court in all relevant respects and remanded the matter for further proceedings. The Supreme Court of Pennsylvania then denied review.

This Court has never considered orders sustaining demurrers but granting leave to amend sufficiently final to vest it with jurisdiction. *See Missouri Kansas R. Co. v. Olathe,* 222 U.S. 185 (1911). *See also Clark v. Kansas City,* 172 U.S. 334, 336-39 (1899); *McComb v. Commissioners,* 91 U.S. 1 (1876). Nor does this case fit

into any of the four categories of non-final state court judgments that occasionally merit this Court's immediate attention. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975).

Despite the passage of more than five years from the filing of this action, Justice Larsen has failed to move it beyond the most preliminary stages of pleading. This Court simply lacks jurisdiction to entertain his request for further interlocutory review.

B. The decision below is based upon an adequate and independent state ground.

Both the Court of Common Pleas and the Superior Court discussed at some length this Court's decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). At bottom, however, both courts decided an issue of state law: whether certain confidentiality provisions in Pennsylvania's Constitution, its statutes, and its rules granted Justice Larsen a private cause of action.

In approaching this issue, the Superior Court bifurcated its analysis. First, it examined *Landmark* and concluded that such a cause of action would, in this case, threaten important interests protected by the First Amendment. 10a-16a. The Superior Court then stated an alternative reason for its holding, a reason based entirely in state law:

> Additionally, we note that if the Legislature had intended to permit the recoupment of damages for violation of 42 Pa. C.S. §3334, it could have very easily expressed such an intention . . . .
>
> Consistent with the aforesaid is the decision of the Third Circuit Court of Appeals in *The First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (1986), wherein it was

> observed that nothing in Pennsylvania's Constitution bars the dissemination of information which the press *has received.*
>
> Thus, nothing in the text of the provisions relied upon by [Justice Larsen] or the case law reviewed suggests that this Court should create a civil remedy not otherwise expressly mentioned in the relevant provisions, and we have been presented with no persuasive argument to the contrary. Accordingly, [Justice Larsen's] request that we endorse a private cause of action ... will not be entertained on the authority proffered to us at this time.

16a-17a (emphasis in original).

Because the Superior Court made a straightforward interpretation of state law in this regard, an interpretation independent of its earlier discussion of *Landmark,* its decision should not be reviewed by this Court.

C. The issue presented here, turning as it does on Justice Larsen's failure to plead his case with sufficient particularity, does not merit this Court's review.

Justice Larsen asserts that this Court should grant certiorari here to decide an issue supposedly reserved in *Landmark,* namely whether the publication of confidential information obtained "illegally" by a newspaper can subject that newspaper to civil liability. *See* Petition, at 11-12. But even the Superior Court was confused by Justice Larsen's vague use of the term "illegal":

> ... [O]ur dilemma is that we are unable to ascertain the thrust of the appellant's 'illegality' argument, *i.e.,* we know not whether it relates to a purported violation of the Pennsylvania Constitution, statute

> and rule of confidentiality covering JIRB proceedings (which, this day, we have found to be wanting), or whether it encompasses the use of subterfuge in obtaining the information published which goes beyond the acceptable bounds of news gathering techniques and exposes news media defendants to liability for torts committed in pursuit of information.

19a. The Superior Court therefore affirmed respondents' demurrer to Count IV and ordered Justice Larsen, by amendment, "to elaborate on the 'illegality' assertion to hurdle the legitimate methods open to the press to obtain information . . . ." 19a-20a.

In Rule 17, this Court has suggested reasons why certiorari might be granted in any particular case. While making no reference to those criteria in his petition, Justice Larsen apparently would style his case as one where "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court . . . ." Rule 17.1.c. This is not such a case. The courts below have merely required that he set forth his claim with sufficient particularity so as to allow them to measure it against state, as well as federal, law. No further review is merited.

III. Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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